Department of Justice
Canada

Ministère de la Justice
Canada

RESEARCH AND
DEVELOPMENT
DIRECTORATE

SOUS-DIRECTION DE
LA RECHERCHE ET DU
DÉVELOPPEMENT

POLICY, PROGRAMS
AND RESEARCH
SECTOR

SECTEUR DE LA POLITIQUE,
DES PROGRAMMES ET DE LA
RECHERCHE

91-04670/

WORKING DOCUMENT

SENTENCING PATTERNS AND SENTENCING OPTIONS RELATING TO ABORIGINAL OFFENDERS

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June 1989

WD1990 - 10a

This study was funded by the Research Section, Department of Justice Canada.

The views expressed herein are solely those of the author and do not necessarily represent the views of the Department.

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ACKNOWLEDGEMENTS

The author wishes to acknowledge with thanks the assistance of those who generously gave their time to respond to interview questions. As well, thanks to Dr. Ab Currie and Dr. Carol LaPrairie at the Department of Justice for their advice throughout the project.

EXECUTIVE SUMMARY

The Department of Justice Canada contracted G.S. Clark and Associates Ltd. to undertake a preliminary study concerning sentencing patterns and sentencing options with respect to native people in Canada. The need for the study was identified on the basis of a recent general concern about natives in the criminal justice system (e.g., the Royal Commission on the Donald Marshall, Jr., Prosecution; the Manitoba Aboriginal Justice Inquiry), as well as more specific statements about sentencing disparities. In terms of the latter, views differ quite radically from those who identify racial biases in sentencing (e.g., Jackson, 1987) to others who claim race does not affect dispositions (e.g., Bonta, 1989). In light of this uncertainty, the need to examine the databases and theoretical/ methodological approaches to the question of sentencing became apparent. The result was this paper.

The question of racial disparities is not an isolated issue. It is bound up in poverty and the inability of many people, native and non-native, to pay fines and are, thus, jailed for fine default. It appears that this problem is especially significant for native people simply because their incomes tend to be among the lowest in the country. The implications of being poor in the criminal justice system recently came to public attention when a Supreme Court judge in Nova Scotia overturned a decision that would have jailed a woman, convicted of stealing cigarettes, who was unable to pay the $500 fine (*The Globe and Mail*, February 10, 1989).

The second part of the report takes a preliminary look at the kinds of sentencing option programs that exist (or have existed) that offer access to native people. Generally, such programs are either universal (in theory, accessible by all citizens within a particular jurisdiction, whether native or non-native), or community initiated (started and operated within the context of a particular native community). Factors such as funding, structure, rationale, objectives and impacts are raised in the examination of several representative programs.

In both parts of the paper, the implications for future research are discussed. It would appear that in the case of sentencing disparity, we must begin by building up the databases that can then be analyzed on a provincial and a national basis. With respect to sentencing options, it will first be necessary to undertake some fieldwork to determine the extent and nature of past and current programs.

Once data have been compiled, comparative analyses of sentencing processes and sentencing alternatives can be undertaken with a view to informing policymaking and program design.

PART I: SENTENCING DISPARITIES

1.0 INTRODUCTION

The reports of the Canadian Sentencing Commission (1987) and the Standing Committee on Justice and Solicitor General (1988) fail to provide a thorough assessment of sentencing for aboriginal people in Canada. In large, the failure is due to the lack of a sound information base on which to identify patterns, make comparisons, and infer causal relationships. The Standing Committee report, for example, makes the unsubstantiated claim that "One reason why native inmates are disproportionately represented in the prison population is that too many of them are being unnecessarily sentenced to terms of imprisonment". The report then concludes simply in its section on native sentencing that more alternatives to imprisonment are required for aboriginal offenders (1988: 212).

While such reports do not exactly typify the level of analysis of aboriginal sentencing in Canada, they are significant because of their high profile. Unfortunately, they do not contribute to the process of sound policy formation. Moreover, even the work that has been done on a more systematic basis is hampered in its analysis because of incomplete databases and uncertain research methodologies. Policymakers are still, therefore, at a loss as to how to make long-term plans regarding sentencing as it affects native people.

The purpose of the present study is twofold:

to examine the question of **native – non-native sentencing disparity** in Canada with a view to providing an overview of the state of knowledge in the area, identifying the gaps in that knowledge, and recommend needed research activities to assist in program and policy development. (These tasks are the subject of this report); and

to examine **sentencing options** for aboriginal offenders with a view to describing the state of knowledge, gaps in the knowledge, and making recommendations for further research. (This work is contained in Part 2 of the report).

2.0 APPROACHES TO THE PROBLEM

2.1 General Concerns

Based on a review of the existing literature, the question of disparity appears to be most often posed within the context of trying to explain the overrepresentation of aboriginal people in correctional institutions. Unfortunately, the literature often limits itself to comparing race to frequency of incarceration (not actual time incarcerated) and does so without reference to sex, age, geographic location, or legal variables such as type/seriousness of offence and prior offences.[1] Jamieson and LaPrairie (1987) outline the difficulties in accurately demonstrating the extent of overrepresentation of natives in the justice system:

> First, few criminal justice agencies collect information on ethnic origin and the reliability of the data is questionable. Second, the backdrop to compare native offenders to the general population is suspect, because the *1981 Census* information on native people conflicts with other native data sources such as figures available from native organizations. Finally, the extent to which native people are over-represented in the criminal justice system relies heavily on information obtained at the correctional institutional level. While it is clear that this source demonstrates that natives form a larger proportion of the inmate population than their apparent numbers in the general population would indicate, in itself it is only indicative that native people are over-represented at one final stage in the criminal justice system – incarceration. It does not shed light on the causes of this phenomenon, i.e. seriousness of the charges, length of sentence. Nor are the data adequate to determine causal links at other levels within the criminal justice system, such as charging and sentencing practices (1987: 4).

Muirhead comments in a similar manner:

> Reliance upon the use of admission data to characterize offender involvement with correctional institutions as reported in the literature has serious limitations. Admission rates fail to reflect the magnitude of the sanctions applied by the criminal justice system to individual offenders and, for this reason, do not provide an adequate basis for an examination of institutional overrepresentation (Muirhead, n.d.: ii).

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[1]For an exception see Muirhead, n.d.

Jamieson and LaPrairie go on to list a series of key research questions that must be addressed before we can begin to accurately explain sentencing and the overrepresentation of natives in the criminal justice system (1987: 4-5). These data requirements are basic; without meeting them, we cannot begin to discern patterns and causality in native criminal justice. With specific regard to sentencing, Jamieson and LaPrairie (1987: 28) list the following information needs:

> Number of natives by offence type, by court location and court level, who receive the following sentences:
>
> (a) carceral, including reason for sentence, length of sentence, time served, type of release;
> (b) probation, including length and specific conditions;
> (c) conditional discharge, including conditions;
> (d) unconditional discharge;
> (e) suspended sentence; and
> (f) fine, amount.

The above list is, in fact, one component of a more comprehensive list of information needs, as follows:

- length of sentence by type of offence,
- type of sentence by type of offence,
- length and type of sentence by prior record,
- all the above by age, sex, and geographic location (urban, rural, isolated).

Meeting these information needs and using them in a comparative way between native and non-native offenders will begin to clarify the nature and extent of sentencing disparities in Canada.

2.2 Theoretical Approaches

In his study of native overrepresentation in B.C. correctional institutions, Muirhead (n.d.) notes the following:

> Theoretical explanations have tended to adopt one of two alternative perspectives. The dominant explanatory model emphasizes the significance of cultural clash between an "inadequate" native sub-culture and the dominant culture into which its members are being assimilated. The alternative explanatory model emphasizes the significance of social structural factors and their historical development in the determination of class-based dependency relationships between all members of a marginal

> underclass of which natives are one component, and the dominant social order (Muirhead, n.d.: ii).

Muirhead's categorization of models corresponds generally with that of Reasons (1977) who identifies an "order/assimilationist" approach and a "conflict/pluralist" approach to the study of race and ethnic relations. The former assumes that "the Indian problem" stems from cultural inadequacies within that racial group and that solutions lie in native assimilation into mainstream society. The latter approach assumes that problems in native-white relations arise from the struggle between racial/ethnic groups with opposed aims and perspectives which, in turn, derive from differentials in economic, political and social power.

In the context of sentencing, Zatz (1987) finds merit in the models referring to class-based dependency relationships and power differentials. She uses Weber's term "formal rational" to characterize the contemporary legal system. Zatz quotes Weber from his *Economy and Society*:

> Formal justice guarantees the maximum freedom for the interested parties to represent their formal legal interests. But **because of the unequal distribution of economic power, which the system of formal justice legalizes**, this very freedom must time and again produce consequences which are contrary to the substantive postulates of religious ethics or of political expediency (Weber quoted in Zatz, 1987: 85; emphasis by Zatz).

Zatz notes that Weber continues by arguing that it is precisely those groups with political and economic power who are interested in maintaining the status quo through the unhampered operation of the formal justice system.

Finally, Zatz suggests that sentencing is bound up in the effort to maintain formal justice. Following on from Weber, she argues the following:

> More concretely, the legal system receives greater legitimacy through formal rationality and the bureaucratization that goes with it. It is seen as meeting out justice fairly and blindly. Yet as Marxist scholars have long argued and the evidence presented here indicates, the factors that go into the decision-rules may themselves be biased, and, in following the rules, this bias necessarily continues into the final sanctioning decisions (Zatz, 1987: 85).

The paper by Zatz is essentially a literature review based on the work of various authors who have worked with primary data, and who have raised theoretical concerns about sentencing. On the basis of her review, Zatz concludes that race is not **the** major determinant in sentencing. It is, however, **one** "potent" factor, in the United States at

least. (Other relevant factors include type of offense, number of prior arrests and convictions, plea bargaining, and pretrial detention.) She maintains that discrimination in sentencing has become more subtle over the years, yet it still exists to protect the vested interests in society. In Zatz's words: "Increased formal rationality of the legal process has caused discrimination to undergo cosmetic surgery, with its new face deemed more appealing" (1987: 87).

While the class-based conflict model discussed by Muirhead and Reasons and taken to fairly far reaching conclusions by Zatz may be somewhat appealing, research has not managed to do the model justice. I have not discovered any studies that unequivocably support Zatz's point that institutionalized discrimination in sentencing exists in order to support the power-holding classes, though more sophisticated theoretical models may yet prove this to be the case.

Thus far, in Canada at least, research concerning sentencing/overrepresentation has been more concerned with identifying the existence and the immediate outcome of sentencing disparities than with explaining the reasons underlying the disparities. In other words, the approach generally taken does not attempt to address the issue to the extent suggested by Zatz.

3.0 A MODEL BASED ON DECISION POINTS

Commentaries on native involvement in the criminal justice system in Canada frequently define overrepresentation as the problem (e.g., the Report of the Standing Committee on Justice and Solicitor General). In essence, as Muirhead says, this is usually expressed as frequency of incarceration and is usually based on admission figures. Again, as Jamieson and LaPrairie point out, this approach tells us only that natives are overrepresented at one stage of the criminal process – incarceration. It ignores other factors that would go farther in explaining the comparative treatment of natives and non-natives in the system; for example, the fact that natives tend to be incarcerated for shorter periods (Muirhead, n.d.) because they are sentenced differently for some offences (e.g., homicide – Moyer, 1987a,b).

It would be more useful to examine criminal justice processing as a series of decision points, any of which can result in disparity between natives and non-natives. If we use LaPrairie's idea of justice processing as a continuum, then we can identify specific decision points on that continuum, each decision addressing a particular class of issue resulting in one of a range of options. In this model, incarceration is just one option resulting from a decision at one point on the continuum.

The decision continuum can be represented as follows:

arrest —> charging —> preliminary & trial —> sentencing —> parole

With respect to the question of native – non-native sentencing disparities, three decision points become especially relevant: preliminary hearing/trial, sentencing and parole hearing. Again, each of these decision points relates to a particular issue and addresses a range of options. This specific model can be expressed as below:

Decision Point	**Issue**	**Options**	**Variables**
Preliminary/ Trial	Disposition	(a) dismissal (b) acquittal (c) find guilty (i) conviction (ii) absolute discharge	(a) prior record (b) offence type (c) sex/age/ location/ education/ employment
Sentencing	Sentence type/ length	(a) conditional discharge	(a) prior record (b)offence type (c) sex/age/ location/ education/ employment
		(b) probation or fine and/or incarceration (with length)	
Parole hearing	Actual time incarcerated	(a) as determined	(a) prior record (b) offence type (c) sex/age/ location/ education/ employment

The "variables" indicated in the figure above are the legal and extralegal variables that must be measured on an issue-by-issue and an option-by-option basis in order to derive an accurate picture of how individuals and groups fare comparatively in the decision-making process. Of course, all comparisons must be made on a native – non-native basis.

Decision points have also been identified in Australia as beginning points for research. Walker (1987: 108-9), for example, raises a number of specific questions about Aborigines in the justice system:

1. Aboriginals appear to be arrested for relatively minor offences more frequently than others. Is it:

   (a) because they commit these offences more frequently?
   (b) because they commit these offences more publicly (e.g., drunkeness)?
   (c) because they react badly to even a well-mannered police approach?
   (d) because of a "previously known to police" status?
   (e) because they are specifically targeted/provoked by police?

2. When arrested, Aboriginals may be remanded in custody more frequently than others. Is it:

   (a) because of their homelessness/joblessness?
   (b) because of the seriousness of the offence?
   (c) because of their prior record?
   (d) because they cannot afford bail or find a guarantor?
   (e) because they have outstanding fines they can "cut out" while on remand? (i.e., choosing prison instead of paying fines)
   (f) because it's a free meal and bed for the night?
   (g) because it's regarded as enhancing one's peer reputation?
   (h) because the police oppose bail?
   (i) because of magisterial prejudice?

3. In court, Aboriginals appear to be convicted more frequently than others. Is it:

   (a) because of the nature of the offence?
   (b) because of the failure of their legal representation (if any)?
   (c) because of their attitude/appearance before the magistrate/jury?
   (d) because police evidence was preferred to theirs where no independent witnesses were available?
   (e) because of their prior record?
   (f) because of the magistrate's/jury's bias?

4. On conviction, Aboriginals are imprisoned more frequently than others. Is it:

(a) because of the nature of the offence?
(b) because of their prior record?
(c) because, where they live, there are no provisions for probation, attendance centres or other non-custodial sentences?
(d) because they cannot pay fines?
(e) because of judicial bias?

The general observations and the more specific questions raised by Walker also apply to Canadian natives.

Basing his analysis on Australian Nation Prison Censuses from 1982 to 1986, Walker observed that for the so-called "other good order" offences, aboriginals are jailed more frequently than non-aboriginals (*ceteris paribus*). For more serious offences, aboriginals tend to be jailed less frequently. However, across all offence categories, Walker found that aboriginals receive shorter jail sentences when prior record is taken into account. Significantly, Walker concludes after tackling each of the questions that:

> The courts cannot be held to blame for the high rates of Aboriginal imprisonment. On the contrary, they appear to be particularly lenient to Aboriginal offenders, especially when one considers that prior imprisonment record is regarded as a key factor in sentencing, tending towards longer sentences (Walker, 1987: 114).

A study undertaken in three northern Ontario provincial institutions between 1983 and 1985 and involving 152 inmates (52 native; 74 non-native) supports Walker's conclusions (Bonta, 1989). Bonta concludes: "Race was inconsequential with regard to court dispositions and prison treatment" (Bonta, 1989: 49). The same study also concludes that other factors, including certain of those identified in the decision points model outlined above and in Walker's questions, are relevant to dispositions and prison treatment. The study by Bonta is among the first in Canada to approach the problem in this way and should be followed up with further research on a broader scale.

The need for focused research is noted by Jackson (1987) with respect to disproportionate rates of imprisonment among the Maori of New Zealand. Jackson notes that sentencing disparities have not been satisfactorily accounted for in that country in part because of a socio-cultural bias in cross-cultural analysis. Jackson writes:

> Inequities which may be uncovered are neither processed into theoretical questionings of decision-making nor used to develop quantitative analyses of structural appropriateness. They are inequities seen as aberrational rather than systemic.

> In analytic terms, this has had two effects. It has limited research to the degree of people's adaptation to set structures, rather than an assessment of the structures themselves. It has also meant that most research into the operation of the justice system towards the Maori offender has merely described the existence of certain disparities between him and "comparable" Pakeha [non-Maori] offenders (Jackson, 1987: 32).

Hagan and Bumiller raise another important consideration in terms of research approach. They maintain that "there are two incipient theoretical orientations implicit in the assumptions that [American] socio-legal researchers bring to this area of work": the individual-processual approach and the structural-contextual approach (Hagan and Bumiller, 1983: 1). Essentially, the model outlined above leans to the individual-processual approach in that it aims to trace the experience of individuals through the decision process with a view to making group comparisons. The structural-contextual approach, however, is also significant because it enables the researcher to specify for study "structural contexts in which discrimination by race is most likely to occur" (*ibid.*: 31). Structural contexts as envisioned by Hagan and Bumiller, for example, refer to rural vs. urban court settings or to specific sentencing contexts such as the death penalty in the United States. They say that it is the structural-contextual differences in sentencing research that often account for what appear to be contradictory conclusions among studies about discrimination. A clear example would be the matching of research results on differential sentencing for homicide in the southern states in the 1960s with similar work in the New England states. The significantly different normative/political contexts would have to be accounted for in the comparison of study conclusions.

Hagan and Bumiller note that while the tendency in the United States has been to take the individual-processual approach (as in Canada), more recent studies also account for the structural-contextual component (unlike in Canada with a few exceptions). Moreover, they maintain that it is possible and necessary to account for both perspectives in any sentencing research:

> The important research on race and sentencing of the future will involve individual-processual analyses of the sentencing process that are also able to take the types of structural and contextual variation we have discussed into account. This research will require data that allow consideration not only of the characteristics of individuals and their cases as they move through the criminal justice system, but also of the structural and contextual conditions in which they are processed; in other words, data collected on individual offenders across stages and settings. This kind of data is costly to collect but necessary for full consideration of the types of theoretical issues we have raised. Sentencing is an outcome of the contextualized processes in which it occurs (*ibid.*: 35).

A recent example of the use of the structural-contextual approach is in a paper by Bridges, Crutchfield and Simpson (1987). They apply Durkheimian, Marxist and Weberian theories regarding the influences of the social structure of areas and communities on law and legal process as applied to "whites and non-whites". They conclude as follows:

> The results of our present study indicate – across counties [in Washington State] – that the relative size of the minority population, the economic standing of minorities, and the degree of urbanization have significantly different effects on white and non-white rates of imprisonment. Courts in counties with large minority populations and those that are highly urbanized sentence non-whites to prison at relatively **higher** rates, and whites at relatively **lower** rates, than other counties. These differential effects occur net of racial differences in arrests for serious and violent crime. Thus, high levels of urbanization and large minority populations significantly increase non-whites' rate of imprisonment relative to that of whites (Bridges *et al*, 1987: 355).

Research on racial disparities in sentencing is considerably more advanced in the United States than in Canada. At present, Canadians are still at the stage of trying to consolidate basic data which will enable us to draw some preliminary general conclusions using the individual-processual approach. With the exceptions of Moyer (1987a; 1987b; 1988), who compared native and non-native sentencing for homicide on a regional basis, and Hagan (1977), who studied the effects of urbanization and bureaucratization (of Courts) on judicial decision-making for Indians and Métis in Alberta, the structural-contextual component has not been effectively employed in Canada.

Following from the variables employed by Bridges *et al.*, the variables of relative minority size, economic status and urbanization could be broadened to cover residence at the time of the crime, where the crime was committed, and where the offender appeared for sentencing. In the Canadian context, with its inherent potential for variation based on geographic location, these variables may be relevant.

There are additional concerns even within the individual-processual approach that, until recently at least, continued to plague American work in the area. Klepper, Nagin and Tierney (1983), for example, point out the following problems:

> ... that the studies of discrimination in case disposition generally suffer from at least one of three major shortcomings: (1) the absence of formal models of the processing decisions in the criminal justice system; (2) failure to consider the sample selection biases that result from the many screening decisions in the criminal justice system; and (3) the use of arbitrary scales for scaling qualitatively different dispositions (Klepper *et al*, 1983: 122).

They go on to say:

> Each of the shortcomings enumerated above is, in principle, remediable. However, correcting them will require a formidable research agenda. Carefully specified models reflecting the essential motivations of the principal actors in the criminal justice system and the dynamics of their interplay are required. Furthermore, the data sets to be considered will have to be carefully chosen and perhaps combined with the results of designed experiments in order to mitigate the effects of sample selection. Novel and complex statistical techniques will be needed for the analysis. While these obstacles are formidable, we see no alternative to addressing these problems (Klepper *et al*, 1983: 122).

Klepper *et al*. clearly believe that we must apply a model which accounts for very specific decision-making along a processual continuum. A model of this type – in basic form – for the Canadian context was presented in tabular form above. I would say, however, that Klepper is suggesting a deeper level of data collection and analysis than we are currently prepared for in Canada. For example, with the exception of Hagan's (1975) study of "law and order vs. non-law and order" judges in Alberta, the factor of individual motivation and biases has not been applied to the study of sentencing disparities in Canada.

I think that we must first clearly document the decisions emanating from the various points in the process before we can take the step of building in motivational factors affecting the decision-making of individual actors. By documenting the actual decisions in conjunction with the legal variables (prior record, offence type) and extra-legal variables (sex, age, location) outlined in the model, we will have a clear picture of sentencing disparity in Canada. At that point, we can begin to delve deeper into causes, as suggested by Hagan and Bumiller and Klepper *et al.*

4.0 THE CANADIAN LITERATURE AND DATA SOURCES

4.1 Introduction

This part of the paper looks at the Canadian literature using the model previously outlined on page seven. The discussion will focus on three decision points in the process: preliminary hearing/trial; sentencing and parole hearing; and their respective decision issues, disposition, sentence type/length and actual time incarcerated.

4.2 Dispositions and Sentence Type/Length

Perhaps the most significant work to date on comparative dispositions and sentence type/length in Canada is by Moyer (1987a; 1987b; 1987c; 1988) and by Moyer *et al* (1987). The analyses by Moyer deal with the characteristics of adult (1987a) and juvenile (1987b) homicide suspects of native and non-native backgrounds while controlling for race and gender. The variable age is included in both analyses, as is marital status in the adult study.

Moyer bases her work on data from the period 1962 to 1984 provided by the Homicide Project, Law Enforcement Program, Canadian Centre for Justice Statistics. The data set contains information on all homicides reported by police since 1962. Data on the victim, suspect, and court procedure (if applicable) are included in the data set for murder offences for 1962-73 and for murder, manslaughter, and infanticide offences from 1974 on. Moyer also notes that most of the victims and suspects data were supplied to the Canadian Centre for Justice Statistics (CCJS) by police departments via the "Homicide Return". Before 1977, all court and correctional data were obtained from CCJS's Court Program. Since 1977, data on court procedures have derived from federal penitentiary admissions data and press clippings (Moyer, 1987a: 3).

The concerns expressed by Jamieson and LaPrairie (*op. cit.*) and Muirhead (*op. cit.*) with regard to the use of penitentiary admissions data are also noted by Moyer (1987a: 40). However, there appears to be little else in the way of a coherent data set with which to work, at least since the mid-1970s.

Moyer's work concentrates primarily on the demographic characteristics and kin relationships of native and non-native homicide suspects and victims. In this regard, she notes that her work was limited to a descriptive analysis (as opposed to a causal analysis) because of the unfulfilled requirement to merge victim and suspect files in the homicide data set. Merging the files would allow multivariate techniques to be applied to a wide range of data on the suspects, the victims and the situational correlates of incidents (e.g., alcohol, weapon, location).

With regard to dispositions and sentences, Moyer offers some comparative analysis accounting for race and gender. Again, however, she points out that since 1975 the data are derived from admissions data and newspaper clippings, thus calling into question the thoroughness of the data and their validity in observations about case processing over time.

The following analysis of the homicide data is taken directly from Moyer (1987a: 40-43).

Table 1 (from Moyer, 1987a) indicates that the outcome of preliminary hearings showed no differences by race or gender. Where the outcome was known, most accused were bound over on the original or on a reduced charge, and very few had charges stayed or waived the preliminary hearings. About five per cent of both natives and non-natives were not sent to trial.

Table 1 **Adult Suspects: Results of Preliminary Hearings 1962-84**

	Male		Female		Total	
	Native	Non-Native	Native	Non-Native	Native	Non-Native
Not sent to trial	4.6	4.0	5.3	8.6	4.7	4.5
Bound on original charge	67.2	73.4	61.6	64.2	66.1	72.4
Bound on reduced charge	9.0	6.6	9.4	11.0	9.1	7.1
Stay	0.6	0.3	0.3	0.3	0.6	0.3
Pending result	0	–	0.3	0	0.1	0
Waived preliminary hearing	0.5	1.9	0	0.5	0.4	1.8
Not known or not applicable	18.0	13.7	23.2	15.4	19.0	13.9
Total Per Cent	99.9	99.9	100.1	100.0	100.0	100.0
Total Number	1,415	5,954	341	729	1,756	6,683

Source: Moyer (1987a)

Table 2 indicates the disposition of the case for the small number of suspects who were not sent on to trial. The most frequent outcome was "charge withdrawn or dismissed" – 82 per cent of natives and 62 per cent of non-natives experienced this outcome. There were substantial racial differences in insanity outcomes. One-quarter of non-native women, compared to only six per cent (one of 18) of native women were judged insane; comparable figures for males are zero per cent for natives and 15 per cent for non-natives. Overall, 17 per cent of non-natives and one per cent of natives were classified insane and therefore not sent to trial.

Table 2 **Adult Suspects: Disposition of Suspects Not Sent to Trial, 1962-84**

	Male		Female		Total	
	Native	Non-Native	Native	Non-Native	Native	Non-Native
Committed Suicide	0.0	4.0	0.0	3.2	0.0	3.9
Charge Withdrawn or dismissed	83.3	61.9	77.7	61.9	82.1	61.9
Insane	0	14.6	5.6	25.4	1.2	16.8
Died after committal at preliminary hearing	1.5	2.8	0	3.2	1.2	2.9
Discharged or no bill after preliminary hearing	7.6	10.5	5.6	6.3	7.1	9.7
ASD or Stay	7.6	6.1	11.1	0	8.3	4.8
Total Per Cent	100.0	99.9	100.0	100.0	99.9	100.0
Total Number	66	247	18	63	84	310

ASD = adjournment *sine die*

Source: Moyer (1987a)

Tables 3 and 4 show the trial outcomes (i.e., acquittal/conviction rates) for natives and non-natives, respectively. Both tables clearly show that in more recent years, especially in the early 1980s but also to a lesser extent in the 1976-80 period, there is a considerable proportion of "unknown" data. A comparison of Tables 3 and 4 shows that the conviction rate of native and non-native males was approximately the same during the 1960s and early 1970s (approximately three-quarters of both groups were convicted). This is not the case for females. Again, non-native women were more likely than their native counterparts to be determined insane at trial. For example, between 1962-70, 27 per cent of non-native women were adjudged insane, compared to four per cent of the native women. In 1971-75, the racial difference was somewhat less (16 per cent of non-native, versus three per cent of native women were found not guilty by reason of insanity).

Table 3 **Adult Suspects: Changes Over Time in Conviction Rates – Natives**

	1962-70		1971-75		1976-80		1981-84	
	Male	Female	Male	Female	Male	Female	Male	Female
Acquitted	19.7	46.7	11.3	16.0	8.6	11.0	8.1	2.3
Convicted	73.3	48.9	75.4	61.7	62.0	56.0	37.1	37.9
Insane	1.6	4.4	1.0	2.5	1.4	1.8	–	1.1
Other	5.3	–	3.7	7.4	2.0	2.8	0.3	1.1
Not Known	–	–	8.6	12.3	26.0	28.4	54.4	57.5
Total Per Cent	99.9	100.0	100.0	99.9	100.0	100.0	99.9	99.9
Total Number	304	45	301	81	442	109	294	87

Source: Moyer (1987a)

Table 4 **Adult Suspects: Changes Over Time in Conviction Rates – Non-Natives**

	1962-65		1966-70		1971-75		1976-80		1981-84	
	Male	Female	Male	Female	Male	Female	Male	Female	Male	Female
Acquitted	15.1	35.7	13.1	22.3	12.3	23.4	11.2	15.3	5.6	7.5
Convicted	72.5	42.9	73.8	45.7	72.9	49.7	66.3	51.5	39.5	29.2
Insane	8.3	19.0	10.0	29.8	8.0	15.8	6.1	10.7	3.3	5.0
Other	2.0	2.4	2.6	2.1	1.7	4.1	0.9	2.0	0.4	2.5
Not Known	2.2	–	0.5	–	5.1	7.0	15.6	20.4	51.1	55.9
Total Per Cent	100.0	100.0	100.0	99.9	100.0	100.0	100.1	99.9	99.9	100.1
Total Number	458	42	772	94	1,378	171	1,713	196	1,373	161

Source: Moyer (1987a)

Other than in the 1962-70 period, when native women were much more likely to be acquitted than native men, there was not a large gender difference in conviction rates among native suspects (Table 3). Non-native suspects showed larger differences: not only were females determined legally insane in larger proportions than males, in 1962-75 they were also convicted in lower proportions than were the men (Table 4). For example, in 1971-75, 73 per cent of the male non-natives but only 50 per cent of the females were convicted of homicide or a related offence. Being a woman had some advantages, but only for non-natives.

Moyer selected 1976 to 1980 as the most recent period when the proportion of known data was at an "acceptable" level – about one quarter of the total had unknown information. Nineteen sixty-seven to 1980 was also chosen because the offence type data in that period correspond to the present situation. Previously, the capital and non-capital murder provisions of the *Criminal Code* were still in effect. Table 5 shows the acquittals and convictions for first and second degree murder and manslaughter separately for

natives and non-natives, and also controlling for gender. (Unknown outcomes were excluded from the totals.) In 1976-80, the conviction rate did not differ greatly by race, but there was a substantial difference between the two groups in the type of offence for which they were convicted.

Table 5 **Adult Suspects: Acquittals and Convictions for Homicide and Related Offences, 1976-80**

	Male		Female		Total	
	Native	Non-Native	Native	Non-Native	Native	Non-Native
Acquittal (total)	11.6	13.2	15.4	19.2	12.3	13.8
1st degree murder	2.1	2.8	–	2.6	1.7	2.7
2nd degree murder	8.0	6.0	7.7	9.6	7.9	6.4
Manslaughter	1.5	4.3	7.7	7.1	2.7	4.6
Other	–	0.1	–	–	–	0.1
Convicted (total)	83.8	78.5	78.2	64.7	82.7	77.2
1st degree murder	3.4	10.5	–	2.6	2.7	9.8
2nd degree murder	14.1	27.5	9.0	10.3	13.1	25.8
Manslaughter	63.9	35.8	57.7	36.5	62.7	35.9
Other	2.4	4.6	10.3	9.6	4.0	5.1
Infanticide	NA	NA	1.3	5.6	0.2	0.6
Insane	1.8	7.2	2.6	13.5	2.0	7.8
Other	2.8	1.0	3.8	2.6	3.0	1.2
Total Per Cent	100.0	99.9	100.0	100.0	100.0	100.0
Total number of known cases	327	1,445	78	156	405	1,601
Number of unknown outcomes	115	268	31	40	146	308
Total Number	442	1,713	109	196	551	1,909

Source: Moyer (1987a)

Moyer points out that as other research has shown (e.g., Canfield and Drinnan, 1981), natives were much less likely to be convicted of first or second degree murder and much more likely than non-natives to be found guilty of manslaughter. Racial differences are clearly apparent when convicted offenders are examined (Table 6). Approximately three-quarters of native men and women were found guilty of manslaughter compared to 46 per cent of non-native men and 56 per cent of non-native women. Convictions for first degree murder were infrequent for natives (three per cent), but 13 per cent of non-natives were found guilty of this offence. Second degree murder also involved a disproportionate number of non-native males (35 per cent versus 17 per cent of native males). For females, however, the percentages were approximately equal (12 per cent and 16 per cent).

Table 6 **Adult Suspects: Types of Offence in Which Convicted, 1976-80**

	Male		Female		Total	
	Native	Non-Native	Native	Non-Native	Native	Non-Native
1st degree murder	4.0	13.5	–	4.0	3.3	12.7
2nd degree murder	16.8	35.0	11.5	15.8	15.8	33.4
Manslaughter	76.3	45.6	73.7	56.4	75.8	46.5
Other	2.9	5.9	13.1	14.9	4.8	6.6
Infanticide	NA	NA	1.6	8.9	0.3	0.7
Total Per Cent	100.0	100.0	99.9	100.0	100.0	99.9
Total Number	274	1,135	61	101	335	1,236

Source: Moyer (1987a)

With these differences in the type of offence for which the offender was convicted, it was expected that natives received much less severe sentences than did non-natives

(Table 7). Almost one-half of non-natives received life imprisonment compared to only one-fifth of the natives. About one-half of natives received sentences of less than five years imprisonment, compared to 23 per cent of non-natives. A substantial proportion of non-native women received especially light sentences – 29 per cent were placed on probation, given a suspended sentence, etc. – compared to ten per cent of the native women (and less than two per cent of the men). Life imprisonment was relatively infrequent for women – one-tenth of natives and one-fifth of non-natives were sentenced to life.

Table 7 **Adult Suspects: Final Sentence, 1976-80**

	Male		Female		Total	
	Native	Non-Native	Native	Non-Native	Native	Non-Native
Suspended sentence probation or fine	1.8	1.5	10.2	28.6	3.3	3.7
Under 1 year	2.9	1.9	8.5	4.1	3.9	2.1
1 year to 2 years	17.3	7.4	37.3	18.4	20.9	8.3
Subtotal	20.2	9.3	45.8	22.4	24.8	10.3
2 years to 5 years	30.1	12.6	22.0	14.3	28.7	12.7
5 years to 10 years	20.6	17.1	11.9	12.2	19.0	16.7
10 years or more	5.5	9.8	0	2.0	4.5	9.2
Life	21.7	49.6	10.2	20.4	19.6	47.3
Total Per Cent	99.9	99.9	100.1	99.9	99.9	100.0
Total Number	272	1,120	59	98	331	1,218

Source: Moyer (1987a)

In conclusion, Moyer could find little to suggest discrimination in the criminal justice processing of adult native offenders. On the other hand, she points out (1987a: 49-50) that the results would have been more definitive if she had sufficient data (such as offence type) to allow further analysis of court processing on a wider range of offences.

Finally, Moyer notes that her data are preliminary and that causal interpretations cannot be drawn from the associations she has described.

Moyer's parallel study of native and non-native juvenile homicide suspects was significantly limited in terms of its analysis of court processing. She points out (1987b: 30) that one component of the CCJS Homicide Program's database concerns the juvenile (now youth) court and adult court processing of juveniles (legally defined according to the jurisdiction's upper age limit) who are charged with homicide and related offences. However, when the CCJS Court Program was stopped in 1975, CCJS turned to newspaper clippings as the major information source for juvenile court processing. This has placed severe limitations on the completeness and reliability of the data, especially since 1976. Even prior to 1976, however, most of the data elements were apparently listed as "unknown".

As a result, Moyer was unable to undertake any more than a very cursory analysis of court processing of juvenile homicide suspects. She concludes as follows:

> The available data suggests that Natives tended to receive much less severe sentences when they were transferred to adult court and convicted [see Tables 8 and 9]; however, this is almost certainly the result of the type of offence with which Natives and non-Natives were charged. It is probable that Natives were disproportionately charged with less serious homicide offences (i.e., second degree murder and manslaughter).

Table 8 **Juvenile Suspects Released to Adult Court: Result of Preliminary Hearing**

	1962-1975		1976-1984	
	Native	Non-Native	Native	Non-Native
Not sent to trial	–	–	14.3	3.8
Sent for trial on original charge	94.3	95.3	57.1	92.3
Sent for trial on reduced charge	5.7	3.5	21.4	3.8
Stay	–	1.2	–	–
Waived preliminary hearing	–	–	7.1	–
Total Per Cent	100.0	100.0	99.9	99.9
Number of known cases	35	85	14	26
Not known per cent	5.4	15.8	68.9	69.0
Total Number	37	101	45	84

Source: Moyer (1987b)

Table 9 **Juvenile Suspects Raised to Adult Court: Final Sentence**

	1962-1975		1976-1984	
	Native	Non-Native	Native	Non-Native
Suspended Sentence Probation Fine	4.2	–	8.3	–
Under 1 year	4.2	–	–	–
1 – 2 years	12.5	17.0	8.3	4.8
2 – 5 years	25.0	7.5	25.0	14.3
5 – 10 years	20.8	11.3	16.7	19.0
10 years or more	4.2	15.1	–	4.8
Life	29.2	49.1	41.7	57.1
Total Per Cent	100.1	100.0	100.0	100.0
Number of cases	24	53	12	21
Not known per cent	11.1	22.1	72.1	73.4
Total Number	27	68	43	79

Source: Moyer (1987b)

Moyer's analysis of juvenile suspects in terms of social variables is substantial and compares to the level of analysis for adult homicide suspects (1987a). Again, however, she notes that the analysis could be improved in all areas if the "suspect" and the "victim" files of the CCJS homicide database were merged, thus enabling the analysis of such factors as victim characteristics, alcohol use, motive, offence type, and the means and location of offence. This would require changing the unit of analysis from the juvenile suspect to homicide **incidents** involving juvenile suspects.

The paper by Moyer, Billingsley, Kopelman and LaPrairie (1987) examines admitting offences and sentence lengths for natives and non-natives in federal, provincial and territorial correctional institutions. The analyses are based on data compiled to the authors' specifications by the Yukon Department of Justice, the Northwest Territories Department of Social Services, the Ministry of the Attorney General of British Columbia, the Alberta Solicitor General, the Saskatchewan Department of Justice, the Manitoba Department of Community Services, the Ontario Ministry of Correctional Services, CCJS, and the Correctional Service of Canada. The information requested was provided fairly completely.

While the admissions data are useful, of particular interest here is the analysis of sentence lengths. Moyer *et al.* note that there were a few differences by race with respect to *Criminal Code* or provincial/territorial offences. For example, CSC data for 1982 "showed that native admissions tended to be very similar, or marginally shorter, than their non-native counterparts with the same admitting offence" (Moyer *et al*, 1987).

In terms of admissions to provincial custody, there was no significant difference in the sentence lengths of the two racial groups. Minor differences suggested that native admissions had somewhat longer terms for some offences than did non-native admissions: *Criminal Code* driving offences (two jurisdictions), assault (one jurisdiction), bail/probation violations (one jurisdiction) and weapons offences (three jurisdictions).

Generalizations could not be made about sentence lengths for provincial/ territorial statute admissions because of the low number of such instances.

Finally, Moyer *et al.* note that "any differences in sentence length that were found cannot, however, be interpreted as evidence for discriminatory practices, for without information on other key variables, especially prior record and number of charges, no conclusions as to bias can be drawn".

Other studies also bear on the question of dispositions and sentence type/length in Canada.

For example, a recent study in British Columbia (Lewis, 1989) studied the effect of sentencing practices in summary conviction courts for the single-charge offences of common assault and theft under $1,000 for a nine month period in 1988. The sample consisted of cases in which the Legal Services Society was involved: a total of 1,772 cases of which 409 were in the common assault category and 1,363 were theft under cases. Aboriginal people comprised 29.3 per cent of the common assault cases and 21 per cent of the theft under cases. In general, the findings showed that:

> ... individuals of Native ancestry with prior criminal convictions were acquitted less frequently and found guilty more often [of theft under $1,000

> charges only] than non-Native individuals in similar circumstances. Individuals of Native ancestry free of prior criminal convictions were granted stay of proceedings more frequently, and found guilty less often than individuals of non-Native ancestry. Single, unemployed individuals of Native ancestry living off-reserve were sentenced to jail time more often than those of non-Native ancestry.

The study included variables such as education, sex, age, employment, and residency (on/off reserve) but the relationship of these factors to sentence outcome for the aboriginal and non-aboriginal groups is unclear, except as previously noted for employment and residency. As LaPrairie points out with respect to the study, "(m)ore sophisticated analysis using regression or other techniques with larger sample sizes would be necessary to clarify the effect of these variables".

Hagan's (1975) study of factors affecting judicial decision-making is one of the few that examines the role of the actors in the system. Hagan focuses on the sentencing of Indians and Métis in Alberta by so-called "law and order" judges and judges not so concerned with issues of law and order. He concludes the following:

> The results of the preceding analysis are at variance with much that is commonly said about the issue of law and order. Data presented provide no support for the view that advocacy of "law and order" leads to the abuse of discretion or the differential treatment of minorities. Instead, the data indicate that among judges an active concern for the maintenance of law and order is linked to a narrow conception of sentencing possibilities. This conception is predominantly based on legal definitions of offense seriousness. In contrast, judges less concerned about issues of law and order adopt a more diverse approach to sentencing. In addition to offense seriousness, prior record, number of charges, and the race of the offender each exert an independent influence on the sentencing decisions of these judges.
>
> Most interestingly, judges who are less concerned about the maintenance of law and order appear to use part of their discretion to provide lenient treatment to Indian and Métis offenders. It can be hypothesized that this favourable treatment is intended to compensate for the differential life chances and cultural experiences of persons of native background (Hagan, 1975: 381-2).

With regard to the last point, Clark's qualitative analysis of judicial decision-making in Nova Scotia, based on interviews with actors in the system, supports Hagan's conclusion (Clark, 1988). The majority of Provincial Court judges in Nova Scotia suggested that they were aware of the difficult conditions facing natives. Furthermore, it

was commonly stated that in the absence of policies and programs designed to redress the imbalance, judgements were made that attempted to compensate for social and economic inequalities. The question of whether judges **should** act in a social compensation role is significant and has recently been addressed by Archibald (1989). As was suggested by the Canadian Sentencing Commission, there appears to be wide variance among judges in the factors they apply to their decision-making. This opens the door to differential sentencing on racial/ethnic grounds.

In a later study, Hagan (1977) examines the question of the effects of urbanization and bureaucratization (of courts) on judicial decision-making regarding Indians and Métis in Alberta. Hagan observes that Indian and Métis offenders in rural areas with less bureaucratized courts tend to be sentenced more severely than Indian and Métis offenders in urban areas. Furthermore, the rural decision-makers tend not to account for correlated legal variables (prior record, offense seriousness, number of charges). As well, rural offenders are more likely to be jailed for default of fine payments than are their urban native counterparts. Hagan concludes that, in Alberta at least, "the fears ... that the use of judicial discretion would encourage sentencing disparities in crowded urban court settings are not supported. Rather ... the trend is toward uniformity in the urban bureaucratized context" (1977: 609). (Note that this finding is supported by Bridges *et al.*, 1987 in the United States context.)

Hagan notes further that since many natives migrate from rural areas to the cities, their differential treatment resulting in more severe sentences in rural courts could plague them in the urban context. It is in the urban context where such prior legal variables come into play.

Hagan's work on judicial predispositions to sentencing along racial lines corresponds to the call for such work by Klepper *et al.* (1983) and Petersilia (1985: 33). It is important because it treats sentencing very much as a decision-making process – a process that can be subject to the biases of individual actors. I would say that we need more of this kind of research, but only after the actual state of sentencing has been clearly identified (see pages eight and nine). When the time is appropriate, the data on attitudes produced by the Charter Project at the Centre for Criminology at the University of Toronto might be applicable, if the information can be effectively correlated with the decisions emanating from the judicial process. (The Charter Project surveyed actors in the criminal justice system across the country in an attempt to measure attitudes regarding variables such as race and ethnic background, in light of the institution of the *Charter of Rights and Freedoms*. Responses from judges may be applicable to the examination of sentencing as a decision-making process.)

A study by Muirhead (n.d.) on native overrepresentation in correctional institutions in British Columbia tested frequency of incarceration (FOI) as a dependent variable against "culture", urban/rural residence, education, sex, age of offender,

population density, and income. Actual time incarcerated (ATI) was then treated as a dependent variable against the same independent variables. As well as being interested in the actual comparisons, Muirhead also wanted to test the "culturalist model" vs. the "structuralist model" as means of explaining native overrepresentation in prisons. He summarizes his results as follows:

> This examination revealed quite different results for the two measures. With FOI as dependent variable, culture, as expected, proved highly significant along with urban residence, education, and age. However, with ATI as dependent variable, culture did not prove to be a significant determinant of offender involvement. Rather, age of offender, population density, urban residence, sex and income were the significant variables.
>
> These findings cast doubt on the use of frequency of incarceration statistics as the principal measure of involvement with the correctional system. And since such data provide the basis for the cultural explanation, this explanation is also challenged. The alternative measure of involvement, the actual time incarcerated, suggests that social structural factors may be the more important determinant of offender populations (Muirhead, n.d.: iii).

Muirhead selected a large cohort (4,990 individuals) on the basis of their having been sentenced to a B.C. correctional institution during the year 1975. Every individual in the cohort was monitored for a period of four complete years from the specific date of admission. The data were gathered by the Adult Offender Data Base and Monitoring System in the Corrections Branch of the B.C. Ministry of the Attorney General.

Muirhead's study is somewhat unique in its longitudinal nature, the size of its sample, and the thoroughness with which the socio-demographic variables were applied. His conclusions are questionable, however, because he does not account for the legal variables of prior record or type/seriousness of offence. As argued in the American material and in Moyer's work, it is essential to build both the legal and the extra-legal variables into any analysis in order for it to approach completeness. If Muirhead's study could be replicated incorporating prior record and type of offence, it would be stronger.

4.3 Actual Time Incarcerated

According to the model on page seven, this category refers to sentence time affected by parole. Parole eligibility is the initial factor applying, followed by the decision of the parole authorities through the hearing process. Again, the legal variables (prior record, offence type) and the extralegal variables (sex, age, location, education, employment) have a potential bearing on the hearing outcome. In this context, the native – non-native variable is independent.

The National Parole Board has recently undertaken a national review of the status of parole as it applies to natives and non-natives. The results of the study are not yet available but should update our understanding of the parole process along racial lines. Prior to the parole board study, there had been little work done in the area.

Data regarding actual time incarcerated will be most readily available from the correctional institutions. Information pertaining to extralegal variables will also be acquired from the institutions.

5.0 ASSESSMENT AND RESEARCH AGENDA

It would appear that we know relatively little about comparative native/non-native sentencing in Canada. The problem stems partly from an inconsistent methodological approach that does not treat sentencing as a process comprising a series of decision points. Furthermore, even when a more comprehensive attempt is made to research the issue (e.g., Moyer, 1987a and 1987b), the data sets are usually incomplete.

In essence, all we know at this point is that there are some sentencing disparities between natives and non-natives in Canada, and that these disparities vary according to a number of factors including gender, jurisdiction, region, urban/rural courts, and type of crime. Among the studies reviewed here, for example, Walker (Australia) and Bonta (northern Ontario) suggest that natives may be treated more leniently. Zatz and others in the United States, however, suggest that being a member of a racial minority tends to lead to harsher treatment. Moyer (Canada) indicates that leniency varies between racial backgrounds, depending on other variables such as the nature of the offence. As Moyer points out, however, the question cannot be resolved using the data available. She notes that "further analysis of the legal and other circumstances surrounding the sentences (e.g., the offence type) is required in order to test this hypothesis" (1987a: 50).

The model presented in this paper suggests that we need data from two major sources: the courts (data on dispositions, sentence type/length, legal variables, and extralegal variables); and correctional institutions (data on extralegal variables, and actual time incarcerated).

It is unclear as to how easily these data sets could be compiled from the various jurisdictions across the country. First, do all courts collect the necessary information? Second, is it easily accessible? A first task, therefore, will be to canvass court jurisdictions to assess the completeness and accessibility of the required information. The next task will be to begin compiling the data by jurisdiction on a longitudinal basis (back to 1976 – the year that the CCJS Court Program was stopped). At the same time,

parole information indicating effects on sentence lengths will be gathered from the correctional institutions.

Initially, it may be most feasible to undertake a number of limited studies in particular jurisdictions (say five or six) with a view to: (a) testing a set of initial hypotheses based on the model and the variables presented here; and (b) testing methodological approaches. At the completion of this preliminary research, we would be ready to investigate the questions surrounding sentencing disparities in a comprehensive manner.

Until we have adequate data with which to work, we will not be able to apply the model based on decision points outlined above. And until we can apply the model, or a similar approach to the data, we will not be able to draw conclusions about the factors that may or may not affect sentencing, the relative significance of those factors, or the extent and nature of sentencing disparities between natives and non-natives.

PART II: SENTENCING OPTIONS

6.0 SENTENCING OPTIONS: INTRODUCTION

The cost effectiveness of incarceration is an issue that has been increasingly debated in recent years in Canada and elsewhere. A corresponding range of sentencing programs has been implemented across the country, particularly since 1974 (Ekstedt and Jackson, 1988a: 5). Programs have centred on fine options, community service orders, restitution, victim/offender reconciliation, temporary absence, intermittent sentences and institutional attendance programs. According to Ekstedt and Jackson (1988a: 4), based on the interests of the Canadian Sentencing Commission, four categories can be considered as true alternative dispositions or noncarceral sentencing options: fine option; community service order; restitution; victim/offender reconciliation. Intermittent sentencing is regarded as an option available to the court that is not necessarily a distinctive program. Temporary absences are a means by which offenders can gain access to alternative programs. Attendance programs are generally not viewed as true sentencing alternatives since they exist within the carceral context.

The following definition of sentencing alternative programs is provided in Ekstedt and Jackson (1988a: 14-15):

1. **Fine Option Programs**

   Includes work programs through which persons are able to earn credits against:

   - part or all of a fine owed
   - part or all of the time to be served in default of paying the fine.

   Includes the administrative process for accounting for fines paid and/or credit for work done (i.e., both court and corrections services).

2. **Community Service Orders**

   Any community-based work programs to which persons are assigned to satisfy the conditions stipulated in court orders. [It should be added with respect to native communities that this kind of program is also applicable to conditions set by community-based bodies such

as councils of elders, who may increasingly handle local offences, particularly among the young.]

3. **Restitution Programs**

Includes restitution and/or compensation to a victim in the form of:

- cash
- return of goods
- repair of property
- payment in kind
- payment to third party for monies spent on the purchase of stolen goods.

4. **Victim/Offender Reconciliation Programs**

Includes programs through which the offender makes amends to a victim other than through restitution/compensation:

- apologies
- making contract between victim and offender and negotiating agreements
- victim impact.

5. **Attendance Programs**

Includes any day-time or residential programme used by:

- inmates released on temporary absence
- probationers as a result of court orders
- probationers on a voluntary basis
- parolees as a condition of release.

6. **Temporary Absence Programs**

Includes the early release of inmates into any programme outside the institution for humanitarian, work, education, counselling and other purposes as authorized by provincial and federal legislation.

7. **Intermittent Sentences**

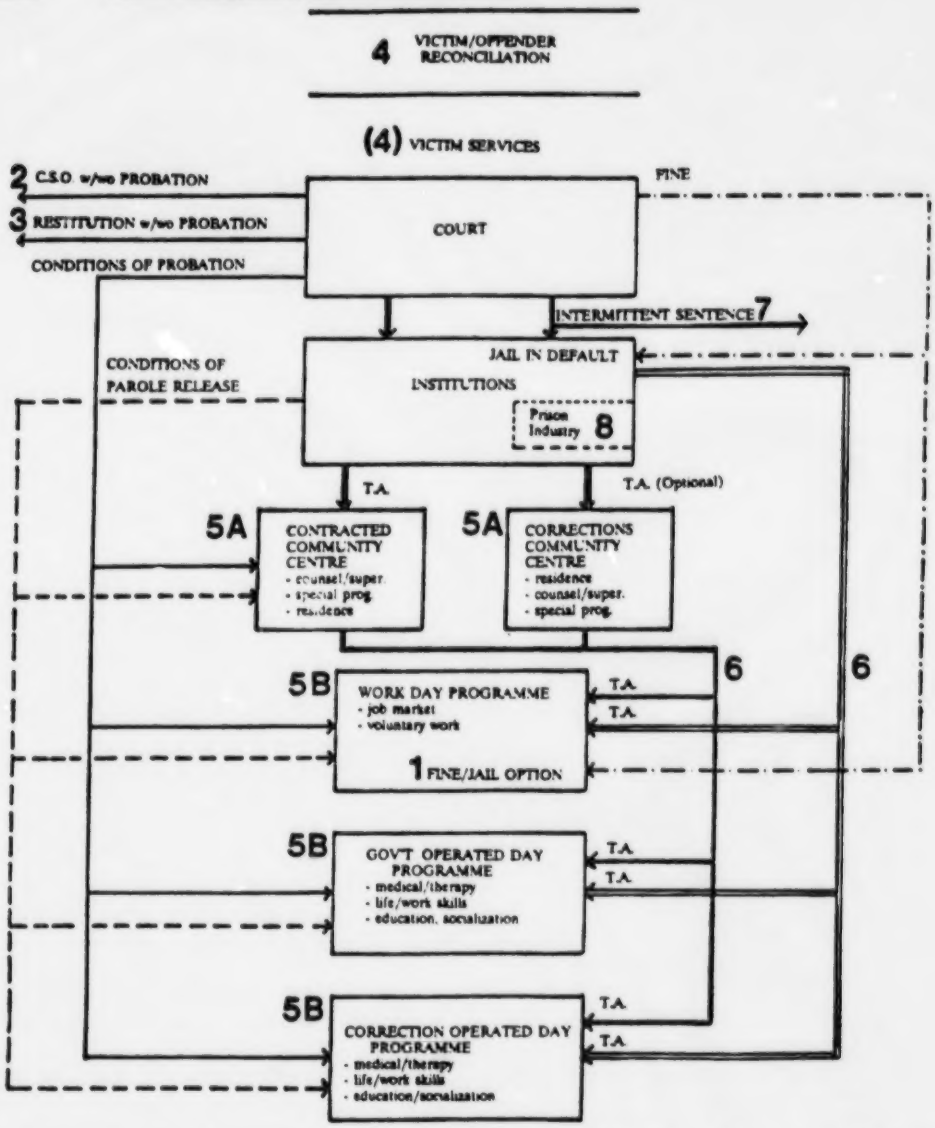
Includes sentences under section 663. (1)(c) of the *Criminal Code* served in correctional centres or police lock-ups.

8. Prison Industries

Includes only those programs involving the production of goods and/or services for sale outside the government system which generates revenue.

The diagram identified as Figure 1 is also taken directly from Ekstadt and Jackson (1988a: 16) and applies the definitions listed above.

Figure 1 **Sentencing Alternatives Diagram**



There does not appear to have been a coherent rationale or plan of action in the development of sentencing alternatives across the country. In large part, this is due to the jurisdictional variation in the judicial process and corrections. The provinces and territories are largely autonomous in the development of their policies and procedures. Nor had there been any kind of national review of alternative sentencing options until the work done by Ekstedt and Jackson (1988a; 1988b) for the Canadian Sentencing Commission. Sporadic evaluations and assessments, pertaining to individual projects, were undertaken but were never analyzed with a view to comparing experiences.

This report reviews selected sentencing option programs – some successful and some not – in order to inform program and policy development. A task for further research will be to document in detail the more serious past and current attempts at native sentencing option programs. It should be noted here, however, that there does not appear to be much in the way of programs or other initiatives specifically geared to providing sentencing alternatives for native people.

7.0 A FRAMEWORK FOR ASSESSING PROGRAMS

Three factors are of particular importance when examining native involvement in sentencing option programs:

- the delivery body (including specification of the provincial/territorial jurisdiction)
  - government
  - nongovernment agency
  - community
  - other;
- the universality of a particular program; and
- the specificity of a program to a native community.

The "universality" and the "specificity" of alternative programs are significant for a number of reasons. Theoretically, native people have access to all the sentencing alternative programs available to the general population. In practice, their access is likely to be limited by various factors, the most obvious of which is location. The administration of many programs is currently centred in urban and semi-urban areas, thus making access a nearly insurmountable obstacle to accessibility for large numbers of natives living on reserves (e.g., the Alberta Fine Options Program). Furthermore, it may be that the same legal and extralegal variables, including race, apply to an individual's chances of entering an alternative program as apply to his/her actual sentencing. Thus, native/non-native disparities in terms of access to "universal" programs may exist for a variety of reasons, as outlined in Part 1 with regard to sentencing. This is a possibility that will have to be researched through the compilation and analysis of data from the courts, correctional institutions and the program delivery bodies.

The problem of inaccessibility of universal programs is countered to some extent by the attempts of some provincial governments to localize the programs. For example, the Manitoba Fine Options Program applies throughout the province and is administered in several cases by local justice committees on the basis of agreements between the reserve communities and the province. While this increases the accessibility of some

programs for natives, those people living in communities without bodies such as justice committees are more likely to continue to "fall through the cracks".

Another area to be investigated concerns the community initiatives that rely on little or no outside funding. These initiatives represent attempts by communities to design and implement processes of community control and individual rehabilitation based, at least partly, on customary practices. It would appear that such developments are becoming more common as communities identify a need to tailor methods of social control to their own needs and values. As well, a number of communities view initiatives such as elders' councils as part of a larger design for community-based justice and self-government.

The focus in this paper is on the "universal" programs that have been or are based administratively in native communities (including urban native communities), and on the community initiatives that have arisen in various places. The question of the universal programs that are not administered by native community authorities (e.g., such as the fine option programs run by the salvation Army in Edmonton and Calgary) are dealt with briefly. However, it is difficult to identify the extent to which they are being used by natives because of the lack of specific data placing natives within the context of such programs.

Often a number of sentencing option programs for native people are run by single agencies. For example, native Counselling Services of Alberta runs community-based fine options programs, youth programs, a Community Corrections Centre, and has been involved in a community diversion project. As well, these agencies interact with agencies that are responsible for delivering universal services to natives and non-natives (e.g., the Salvation Army). The approach to assessing sentencing option programs must, therefore, be done on an integrative basis, rather than on a typological basis (assuming that the organizational implications of a single agency managing separate programs is a factor that must be taken into account). In terms of this paper, this means that sentencing option programs are first assessed on a jurisdictional (e.g., Alberta) basis and, secondly, on a type-by-type (e.g., fine option program, CSO program) basis.

8.0 AGENCY ADMINISTERED UNIVERSAL PROGRAMS

8.1 The Case of Alberta

Alberta combines a number of approaches to the delivery of universal sentencing options, as well as programs that are unique to the native context. Organizationally, there are three groups of players involved:

- Native Counselling Services of Alberta (NCSA);
- community service agencies (most notably the Salvation Army; and
- individual native communities.

Native Counselling Services of Alberta (NCSA) is a non-profit agency geared to the provision of legal and extra-legal services (the latter primarily through referral) to native people in Alberta. Funding is received from a variety of federal and provincial sources, and ultimate authority rests with a volunteer Board of Directors. NCSA may be best known for its active Courtworker Program which it has operated throughout Alberta since the 1970s. Currently, the NCSA runs its courtworker service out of 21 offices province wide, including Edmonton and Calgary. NCSA also contracts with the province to undertake probation services out of the same offices.

8.1.1 The High Level Diversion Project

The High Level Diversion Project in northwestern Alberta was one of NCSA's more ambitious alternative programs. It began in 1977. The project was established as a first step in the direction of community-oriented pre-trial diversion for juveniles and adults by providing an alternative to incarceration for minor offences and fine default, and by using community resources in the administration of justice. Restitution and reparation for the community were project priorities.

The project was designed by NCSA in conjunction with community representatives, supported by provincial officials. Once operational, the project was run from High Level by trained staff, many of whom were from the community.

The terms of the agreement between NCSA and the government called for an evaluation after three years. On the basis of that evaluation, the decision was made to stop the project. The withdrawal of support for the High Level Diversion Project is an issue that raises concerns about community-based alternative programs, and about the roles of the community, the government and other central agencies such as NCSA.

The evaluation examined a number of questions, including the level of community support (including the support of justice system personnel) and management efficiency/ effectiveness. With regard to the first question, community and justice system support was seen to be low. Chester Cunningham, Executive Director of NCSA, noted in an interview for this report that the lack of clients had a significant bearing on the decision to discontinue the project. We have since come to realize that considerable education of community members and familiarization of justice system personnel with any new program is essential before it can be effectively operationalized. Stan Jolly of the Ontario Ministry of the Attorney General confirms this through his example of the Ministry's attempts to set up a system of native justices of the peace. Throughout the process, considerable time and effort are required in working with community leaders

and with justice system personnel (judges and crown attorneys primarily) in order to establish the credibility of the new program. Only then will a sufficient number of community members and justice system personnel work effectively with the new JP's. This part of the developmental process appears to have been bypassed in the High Level project.

The evaluation of the High Level Diversion Project focused on another area that ultimately was the major issue in the decision to stop the project: management efficiency. The project was funded by three departments (two federal and one provincial), each with its own reporting criteria. From the perspective of the departments, the project's managers were not reporting as often or as completely as required. From NCSA's viewpoint, the reporting requirements set by government were too demanding for the project officers, given their workloads. Furthermore, NCSA has suggested that the audit procedures applied to the project were inflexible and did not account for cost requirements that applied legitimately in the context of the project.

In all, NCSA concluded that governments must commit to more than two or three years of funding support for new projects. Second, they must be flexible in their management and reporting expectations. And third, governments must be prepared "not to throw the baby out with the bath water" as the result of one project not meeting expectations. As Keith Purves of NCSA said in his interview, if it has been established that the need exists for diversion programs, then it is important to carry on trying to meet the need. This is best done by modifying previous attempts, not by ending the effort entirely.

Finally, it should be noted in connection with the High Level Project that the evaluators and NCSA were agreed that governments tried to maintain too much control of the project – to the point of confusing all parties as to who was responsible for running it. The evaluators are quoted in a paper written by NCSA:

> Community-based programmes must have control based firmly in the community and in the private agency which is administering the programme, not in the formal agencies of the criminal justice system (1982: 329).

8.1.2 Fine Options

NCSA operates 21 offices in non-reserve communities throughout Alberta, including Edmonton and Calgary, from which it runs its Native Court Worker Program. While the court workers report on their activities (not including names of clients) to band councils, they remain independent from the bands and account only to NCSA. The NCSA's experience with Alberta's fine options program has been limited to its office in Gleichen. The two court workers in the Gleichen office have managed the fine options

program for native people from the area, including the Gleichen Reserve, beginning in 1981.

Reserve communities, with the exception of Gleichen, have not become involved with the fine options program. On the basis of discussions with representatives of six Alberta bands, it would appear that the reasons for non-involvement vary. The following reasons were cited:

- other agencies already have the program under control;
- inadequate time and human resources to handle another program; and
- Correctional Services (Alberta) will not assign program responsibility to bands (this view expressed on the basis of preliminary discussions between a band and Correctional Services).

The first reason is significant, but does not explain why the program has not been well established outside Edmonton and Calgary. Alberta has recently privatized the implementation of the fine option program among various placement agencies, including the Salvation Army, the Red Cross and the John Howard Society. The Salvation Army, according to Sam Nahirney, coordinator of the Salvation Army's fine option program), handles approximately 80 per cent of the province's fine options cases through its Edmonton and Calgary operations. This represents about 200 cases per month in each city, including a total of approximately 40 young offenders. Mr. Nahirney estimates that about 15 per cent of the Salvation Army's fine option clients are native. The other agencies handle fewer fine option clients than does the Salvation Army. They also operate primarily in Edmonton and Calgary.

Two questions remain:

Why is the fine option program not in place outside Edmonton and Calgary.

Why have bands not taken on the responsibility of starting the program in reserve communities?

There does not appear to be an unequivocal answer to these questions. The provincial government claims to be open to the idea; yet bands have never seriously approached Correctional Services about the possibility. In contrast, the situation in Saskatchewan and Manitoba is significantly different, as is explained later in the report.

8.1.3 The Grierson Community Corrections Centre

The NCSA has recently taken over, and is in the process of expanding the Grierson Centre located in Edmonton. NCSA's involvement is based on a joint agreement between NCSA, the province and CSC (CSC owns the facility). Currently, forty native men are incarcerated at the centre, where they have the benefit of counselling programs.

NCSA takes the position that alternative sentencing projects for adults and, especially, for youth should be developed at the Grierson Centre. Proposals to this effect are to be made to the Province.

8.1.4 The Talking Drum Youth Program

The Talking Drum Youth Program is an NCSA-run program funded by the Alberta Solicitor General, the National Native Alcohol and Drug Abuse Program (Health and Welfare Canada), the Alberta Alcohol and Drug Abuse Program, and the Native Services Branch of the Alberta Ministry of Muncipal Affairs. The program has been in operation since 1986 and works in the Assumption, the Wabasca/Demarais and the Back Lakes areas.

Native youth take part in the program as part of their probation orders in communities where it operates. Advisory committees comprised of elders and young people in each of the communities set program activities and discuss youth problems. Local people are hired and trained as youth workers. Currently, the youth workers are trained in the areas of recreational programming, educational planning, and drug and alcohol counselling. They supervise probationers and are often asked by judges to provide information to the court (formal probation officers provide the written pre-sentence and pre-disposition reports).

The youth workers are hired by committees of community members and NCSA representatives. They report monthly to the band council of the communities they serve, but are ultimately accountable to NCSA. The communities have regular feedback into the program through the youth workers and NCSA. The aim is to have the communities take over program operations at some future date.

A program review was to be done in 1989. At the time of writing, however, discussions with the NCSA officer responsible for the program and representatives of two of the program communities suggest that the program is successful in its aim to decrease recidivism and to involve young people in their communities. (Data to demonstrate these trends will presumably arise from the program review.) On the negative side, NCSA and the workers think that training must be made more comprehensive to include

suicide counselling and sexual abuse counselling. The feasibility of these suggestions should be examined in the program review.

8.1.5 Alberta: Summary

As Ekstedt and Jackson (1988a: 129) point out, the trend in Alberta is to the privatization of sentencing option services. The NCSA is the only native organization that has taken advantage of this policy. Indeed, Alberta is unique in that it has only one organization that is dedicated to the provision of sentencing option programs to natives.

Generally, Alberta is not well developed in terms of sentencing alternatives. The community service order (CSO) program, for example, has not met with resounding success (Ekstedt and Jackson, 1988a: 120-121). The CSO program, which was used as a condition of sentencing, handled between 80 and 90 individuals per month during a five-year period. It is not clear how many of those individuals were native. Similarly, the Pilot Alberta Restitution Centre, which operated from 1975 to 1977 with federal and provincial funding, did not meet with particular success. Discussions with members of the Alberta native community suggest that native involvement in the program was negligible, understandable in view of the fact that the program involved monetary pay back to the victim.

While this paper is not intended to evaluate the work of the NCSA, it would appear that the organization is effectively providing legal services to native people in a number of ways. The fact that standard fine option and CSO programs have not been widely mounted in native communities may speak to the Alberta government's failure to develop policies and programs in this area, rather than to the NCSA's capabilities.

8.2 Saskatchewan

8.2.1 Introduction

Saskatchewan differs from Alberta in a number of ways, including the absence of a single native organization geared to the provision of legal services, and more highly developed sentencing alternatives policies and programs. While the province does not have programs specifically designed for natives, provision is made to involve native communities in the delivery of universal sentencing option programs.

8.2.2 The Fine Option and CSO Programs

Saskatchewan's fine option and community service order (CSO) programs have been in operation since 1974 and 1983, respectively. The programs are separate but can be described together because, to a large extent, they deliver services through the same organizational structure. The Saskatchewan Department of Justice (Corrections)

contracts out to communities, including reserve communities, for the administration of the programs. The "agents" who are responsible for managing the contracts include the following:

- Cities. Non-profit agencies such as the John Howard Society (Regina) and Native Friendship Centres (8 in total, including Moosejaw and North Battleford).
- Towns. The town council.
- Reserves. Chief and council.
- Métis communities. The community council.

Altogether, there are 322 agents throughout the province administering one or both of the programs (most administer both). The total includes 65 reserve communities. The breakdown for reserves and Métis communities is as follows:

	Bands	Métis Communities
Fine Options	62	18
CSOs	53	16

Source: C. Joyner, Saskatchewan Department of Justice (Corrections) (1988)

Cathy Joyner, the Saskatchewan Department of Justice official interviewed for this report, indicated that departmental statistics relating to probation are not complete because the recording system is not yet fully operational. However, the data on hand show that the percentages of offenders on probation in 1987-88 are as follows:

Status Indian	38 per cent
Non-status Indian and Métis	7 per cent
Non-Native	55 per cent

In terms of involvement in the programs, departmental data indicate that adult participation in the fine options program in 1987-88 was approximately 8,700 individuals (data not available for young offenders). The figure of 8,700 adults includes individuals on probation and individuals incarcerated for fine default who are released to work off their fine. Of that total, approximately 4,500 were Status Indians and 774 were other natives (including Métis). The rate of native involvement in the program has remained fairly constant at between 55 per cent and 65 per cent since 1974. (The department expects an increase in enrolment in the fine option program in 1988-89 – after the results are tallied – due to an increase in *Motor Vehicle Act* and *Liquor Control Act* offences. The total numbers may reach 12,000 individuals [adults and young offenders] and 16,000 placements.)

The fact that up to 65 per cent of participants in the Saskatchewan fine options program are native is significant because it is often assumed that natives spend longer periods in jail than non-natives. Therefore, we must examine the relative rates of participation in sentencing option programs vis-a-vis length of sentence served. The use of admissions data would be misleading in this case because offenders who enter the fine option program can go to jail first and be released shortly thereafter.

In 1987-88, the total number of individuals involved in the CSO program was approximately 1,100 (adults and young offenders). The department does not yet have a breakdown of the total in terms of native/non-native. Approximately 40 per cent of admissions to the program have been for fine default.

Both the fine options and CSO programs are structured in a decentralized manner. Six departmental coordinators oversee the agent organizations from probation offices throughout the province. The coordinators are responsible for the allocation of offenders to specific agencies, handling problems as requested by the agencies, ensuring that the agents are carrying out the terms of their agreements with the department, and orienting and training individual agents. In reserve communities, the individual responsible for carrying out the program is selected by Chief and Council and is often a band employee such as a drug and alcohol counsellor or a clerical staff member. The agreement specifies that each agency should appoint a back-up in the event that the primary agent cannot carry out his/her duties. The extent to which agencies formalize this condition is in doubt.

Agencies are paid $20,00 per placement by the Saskatchewan Government for the fine options program and $20.00 per person in the CSO program.

A program review of the fine option program was done in 1983-84. The review pointed out certain problems, some of which have not yet been resolved. Generally, the evaluators recommended a streamlining of the administrative process. In particular, fraud by individual agents in the recording of time worked by the offender appears to have been problematic. In the event that a departmental coordinator is able to uncover an action such as this, the agency can be suspended from carrying out the program. In such cases, the coordinator attempts to allocate the offenders in the programs to other existing or *ad hoc* agencies, hopefully to re-instate the offending agency in the future. This appears to be a particular problem for some reserve communities and small towns because of the pressure on the individual case worker from family and friends of the offender to write-off time worked. Suspension of a reserve community from the program is especially problematic because there tends not to be another native agency in close proximity to which the offenders can be transferred. Offenders then often become in default of fine payment (if they have chosen this option in the fine options program) because the program suddenly ceases to exist in their communities.

Another problem affecting reserve communities concerns bands' financial status and the "block funding" that agencies receive at the beginning of the year to run the programs. In several cases, bands have expended all available funds before the end of the fiscal year and their band offices have ended all operations. In these cases, the funds for the programs are frozen and no one remains to handle the cases. Again, the provincial coordinators attempt to place the offenders with other agencies; however, the problem of proximity remains.

In spite of the problems outlined above, both the Saskatchewan Department of Justice and the 65 reserve communities involved in the fine options/CSO programs (based on interviews with representatives of five bands) believe that the programs are necessary and generally satisfactory. Like many programs managed by native organizations, the bands suggest that their individual program agents require more comprehensive training in the administration of the program – orientation/training currently amounts to one day with a provincial coordinator.

8.2.3 The Saskatchewan Restitution Program

The Restitution Program is more centralized than the fine options/CSO programs in that it is administered by the six coordinators in the probation offices throughout the province, rather than by community agents. The Saskatchewan Department of Justice (C. Joyner communication) estimates that in one year approximately 1,600 people will be ordered by judges to pay restitution of varying amounts. (Alternatives to cash restitution will be possible in the future.) The department further estimates that 49 per cent of the offenders paying restitution under the program are native (Status Indian, Non-status Indian and Métis).

The success of the program is as yet unclear. Native people typically have difficulty in making cash restitution, either in the form of payment to the victim, or as fines (hence the high proportion of natives incarcerated for fine default). While the data were not readily available, native community representatives noted that the inability to comply with restitution orders had been a problem for several of their community members.

8.2.4 The Saskatchewan Bail Program

This program involves the release of offenders on bail (or no bail, depending on the judge's order) and on the condition that they report to a bail supervision officer until their sentencing hearing. Incarceration on remand is thus avoided, an important factor in justice administration especially with increasingly loaded court dockets. There is currently a ceiling on the number of clients accepted by the program, simply to ensure its effective management. The program currently is comprised of close to 60 per cent native individuals.

8.2.5 The Impaired Driver Treatment Program

This program is carried out on an intensive two-week basis at the St. Louis Alcohol Rehabilitation Centre and is open to natives and non-natives (data relating to actual numbers are not available). While the main purpose is rehabilitation, participants are not required to serve the 14-day mandatory incarceration for second offenders. The centre has a capacity of 30 individuals on a revolving basis of about 15 people per week.

Program attendance is ordered either by a judge or by correctional centres, which can release an offender to St. Louis for the last 14 days of the sentence. Because of the intensity of the program, people serving intermittent sentences are not eligible. A sentence of at least 21 days is usually required for admission to the program from a correctional centre because of the time required for the program (14 days), remission and travel.

8.2.6 Attendance Centres

Saskatchewan has two attendance centres: one in Regina and one in Saskatoon. The centres offer intensive day-time courses in areas such as money management and alcohol problems. The program is usually recommended by Probation Services and counts as part of an individual's probation time. While native individuals do take part in the program, in view of the high native populations in Regina and Saskatoon, the program is not suitable for reserve or other rural communities because of the need to attend the centres on a daily basis. The Saskatchewan Government has indicated that it might enlarge the program at the centres. However, the problem of geographic location remains for residents of reserve communities.

8.2.7 Saskatchewan: Summary

There is currently a substantial amount of migration of native people from their reserve communities to Regina and Saskatoon. On the other hand, it is important to note that the yearly increase in **incarceration rates** is highest in the northern part of the province:

Northern Region (centred on Prince Albert)	10 per cent annually
Central Region (centred on Saskatoon)	4-5 per cent annually
Southern Region (centred on Regina)	0.5 per cent annually

Both these factors suggest the importance of justice programs to which native people have access. The community-based management of the fine options and CSO programs appears to be fairly effective in the sense that it can adapt to regional

variations in type and volume of offences. However, in order to more effectively handle community-specific needs and the increasing program needs in Regina and Saskatoon, two new thrusts may be needed:

(a) the establishment of more community-based justice programs (including sentencing option programs) as part of an overall plan to aid community development; and

(b) the assessment of the need for justice programs geared to native people in Regina and Saskatoon, and the design and implementation of such programs.

With regard to the first point, the Saskatchewan Department of Justice is currently looking at establishing community corrections committees similar to the justice committees in Manitoba (see below). These committees would be involved in pre-release planning for native and non-native inmates to enable their return to their reserves or rural communities. Committees, which would include elders and other community members and group representatives in reserve communities, would also engage in pre-sentence reporting to the court. Two pilot projects are now being planned: one on the Key Reserve and another in one of a number of possible small cities or towns.

The province has not yet started to assess the need for native-oriented sentencing option programs in Regina or Saskatoon.

8.3 Manitoba

8.3.1 Introduction

Manitoba, like Saskatchewan, has had a history of involving communities, including native communities, in the management of its sentencing option programs. As well, Manitoba has had a relatively long experience with community-based justice committees, with varying results. A significant example of community-based programs is the probation services program of the Dakota-Ojibway Tribal Council. Interviews were held with representatives of the Manitoba Community Services and Corrections Department, the Manitoba Department of Justice (formerly the Department of the Attorney General) and the Dakota-Ojibway Tribal Council.

8.3.2 The Manitoba Fine Options/CSO Program

Since 1986 the fine options and CSO programs have been combined under the administration of the Manitoba Community Services and Corrections Department. The programs are managed from eleven regional offices by a coordinator in each office.

There are currently four district offices in Winnipeg and seven regional offices outside Winnipeg. The coordinators of the programs receive an initial orientation and gather at a forum in Winnipeg every three months for updating on departmental policy.

The department contracts with approximately 145 agencies, including approximately 45 bands and 10 Friendship Centres around the province and Manitoba Métis Federation Offices. The contracts are referred to by the department as "ongoing" (i.e., they are continued without being renegotiated on a yearly basis), although either party can leave the agreement with three months notice.

Each of the contracted agencies assigns a "contact person" to run the programs within their community. In the case of bands, it is the chief and council who identify the responsible individual, often the local Native Alcohol and Drug Abuse Program (NADAP) worker. The contact persons receive an initial orientation, as do the regional coordinators. However, they are not brought together for the three-month forum attended by the coordinators. In 1986, a workshop was organized for all contact persons. The workshop was effective but deemed too expensive to try again. Regional workshops for contact persons and coordinators are now being planned as an alternative.

Manitoba does not view the fine options/CSO programs as a final answer to reducing incarceration but as bringing a balance to the system for people who cannot afford to pay. The programs are also seen as valuable because, through contracting they involve the community in the justice process. Furthermore, the department tends to allow communities to set their own standards for program operations; for example, community services to be undertaken by offenders are set according to community standards of what is fair and reasonable. Manitoba judges set the number of hours to be worked, but they allow the probation officers and the community contact persons to determine the location, type and timing of an offender's work placement. The programs do, however, have to follow a set of minimum guidelines established by the department and set out in the contracts.

The volume of clients for the two programs breaks down as follows on a native/ non-native basis for 1988 (data supplied by the Manitoba Department of Community Services and Corrections):

	Fine Options	%	CSO	%
Status Indian	3,511	39	481	29
Non-Status Indian	280	3	67	4
Métis	730	8	118	7
Other*	3,052	34	734	45
Unknown**	1,422	16	231	14
	8,995		1,631	

*Other refers to non-native.
**Several agencies, including those in Winnipeg, handle native and non-native clients. Ethnic origin is not always recorded by these agencies.

As the above figures indicate, clients of aboriginal ancestry (Status Indian, Non-Status Indian, Métis) accounted for at least 50 per cent of the clientele in the 1988 fine options program and 40 per cent in the CSO program.

A program review completed in 1987 (Sloan, 1987) indicated that the rate of successful completion of the fine options program is highest in the rural areas of the province (e.g., 90.8 per cent successful in the Interlake Region compared to 67.9 per cent successful in Winnipeg); furthermore, individuals of native ancestry completed the program more often than non-natives (Sloan, 1987: 7-8). Sloan attributes the higher rate of success in rural areas to the community pressures to do well in the program and to reform one's behaviour. Native community representatives contacted for this study confirm that this is an important factor in making any correctional program work effectively in native communities.

There have been some problems with the fine options program, as suggested in the program review. On the basis of discussions with a departmental representative, it would appear that similar problems pertain to the CSO program, as well. In particular, the problem of "fraud" at the community level is an continuing concern, as it is in Saskatchewan. The contact person, in smaller native and non-native communities, is often under pressure from family and friends of the offender to falsify the records of work done. An even greater problem is "favouritism" shown to certain offenders in terms of where they are sent to work in the community. These problems are discussed regularly by all those involved in service delivery. However, no solution has been found. In the case of bands, it may be appropriate to have the chief and council, along with the departmental coordinator, approve all placements made by the contact person. The department continues to wrestle with the problem while being aware of the danger of removing control of program delivery from the communities.

Finally, it should be noted that the Manitoba fine option program, unlike the program in other provinces, has no screening criteria. In other words, program applicants do not have to register before their default date or before a warrant is issued. Police and the correctional institutions (prior to admission) are both supposed to point out the availability of fine options to the offender. Thus, the program is relatively flexible in that offenders can enter at almost any point. The province claims that this produces good results in terms of getting people into and through the program.

8.3.3 Manitoba Justice Committees

The Community and Youth Corrections Branch of the Manitoba Department of Justice (formerly the Attorney General) began to establish justice committees in the 1970s under Section 69 of the *Young Offenders Act*. Currently there are 52 justice committees throughout the province, of which six are in reserve communities: Norway House, South Indian Lake, Ebb and Flow Reserve, Fisher River, Pequis and Rosseau River. Rosseau River's committee has been in operation since 1975, while the other reserve committees have existed for three to four years. One Métis community, Mallard, also has a justice committee. As well, of eleven justice committees in Winnipeg, only one is native. It was established in the fall of 1988 as part of the Mamawiitchita Centre, a native child welfare agency.

The justice committees are voluntary and receive only administrative support from the government. Their purpose is to implement the Alternative Measures program. As with the fine options program, the Manitoba government is quite flexible in terms of how individual committees are allowed to carry out their mandates. The committees specify which of the provincial criteria for alternative measures they want to apply; that is, they can decline to handle certain types of cases. Generally, as committees gain more experience, they take on increased responsibility.

Typically, the justice committees meet with young offenders and their parents to identify appropriate restitution activities, community service work, victim assistance activities and treatment. The committees then monitor the young person's progress through his/her schedule. Justice committees have occasionally been asked to speak to sentence.

Justice committees are established largely through the proactive involvement of departmental representatives in communities. These individuals will make a presentation in a community and try to establish a core committee. A constitution is then developed from a range of options by the core committee in consultation with departmental representatives. Training of committee members is structured to familiarize the members with the justice system and with justice system personnel. Once trained, committee members are designated by the minister as "Honourary Probation Officers" and sworn by a local judge.

Justice committees in native communities have from six to 15 members, depending on the community's size. Each committee has an Executive and is formally supported by the chief and council through a band council resolution. Committees meet from one to two times per month with a departmental staff person in attendance at all meetings.

A criticism of the Manitoba justice committees, including those in native communities, has been that their membership consists mainly of professionals, rather than a cross-section of people. As well, in native (i.e., reserve) communities, the professionals are often non-native. The question becomes: to what extent are the committees representative of the communities? This is a difficult issue to assess in the absence of extensive interviewing in the communities. On the basis of discussions with representatives of four of the band councils associated with justice committees, the sense is that the committees' make-up is generally acceptable.

The departmental representative interviewed noted that the success of the committees tends to be better in "rural" communities (not specifically native) than in "reserve/isolated" communities. In part, this is because it appears to be more difficult to establish the committees in the reserve/isolated communities, and because it is often more difficult for the departmental staff to keep in touch with the more distant communities.

8.3.4 Community Participation Agreements

As an alternative to justice committees in the more remote reserve communities, the Department of Justice has entered into yearly contracts with fifteen bands to do the day-to-day probation work in the absence of a full-time probation officer. The contract is set up on a fee-for-service basis with an individual hired by the band undertaking the work. (The department is also involved in the hiring process.) The individual justice worker is trained by the department. The justice worker is expected to be in regular contact with the probation officer who works on a regional basis (in northern Manitoba the office is located in Thompson).

There appear to be problems with the program, if we accept a high turnover rate of justice workers as an indication. The explanation shared by the department and the communities is that because the job is not full-time, it must be doubled up with another band-sponsored job. This jeopardizes the worker's ability to invest the time required in probation supervision. Also, the skill level of the justice workers generally needs improvement, particularly in the area of writing/reporting. The departmental representative interviewed agreed with the bands that more training funds are required.

In the absence of program evaluations, we do not have a good sense of the effectiveness of either the community participation agreements or the justice committees in Manitoba. Evaluations of both should be undertaken as soon as possible.

8.3.5 The Dakota-Ojibway Tribal Council Probation Services Program

This program has been operating since 1985 on the basis of shared federal-provincial funding. It began as a three-year pilot project and will finish its fourth and final year in June 1989 unless funding is renewed. The program is run by a Board of six of the seven Dakota-Ojibway Tribal Council chiefs. (Rosseau River, while a member of the Dakota-Ojibway Tribal Council, is not involved in the program, in part because it has its own Justice Committee.) The mandate of the program is to handle probation cases for the province through management of alternative measures cases, fine options cases, CSO cases, and the preparation of pre-sentence reports and pre-disposition reports. As well, the service handles parole supervision for the federal government. The Director estimates that the program handles approximately 90 cases at any given time.

The program's staff consists of three full-time officers, one part-time director, a contract youth worker (on separate funding), and a secretary. Each participating band office has a "contact person" who is responsible for contacting the program personnel on a regular basis to update them on the activities of probationers.

The department is concerned about a high staff turnover rate that has plagued the program since its inception, as well as the level of staff skills (especially communication skills). On the other hand, it should be pointed out that the Manitoba Department of Justice is responsible for training the program's officers.

The Dakota-Ojibway Tribal Council Probation Services Program, like other programs currently in operation, is ripe for a thorough evaluation. This is especially appropriate in view of the fact that it is at the end of its pilot project status.

8.3.6 Manitoba: Summary

Manitoba is the most advanced province in terms of its decentralization of sentencing option programs to the communities, including reserve communities. This strategy appears to have had some success, however, comprehensive program assessments are required in order for the effectiveness and impacts of programs to be thoroughly evaluated.

One problem may be the quality of program administration at the community level. In part, this may result from inadequate training of community-based workers, as well as from an inability of provincial professionals to keep up with the monitoring and assistance of community programs on a regular basis.

In spite of such problems, it is fair to comment generally that both the communities involved and the provincial government view current programming as preferable to the province attempting to run sentencing option programs directly.

8.4 British Columbia

British Columbia does not have a fine option program. However, it does have a universal program known as the Community Service Work Program. Through this program, Probation Services of the British Colombia Attorney General contracts with rural and isolated communities, including native communities, to provide a community work service for offenders. As in Manitoba, community representatives, who are appointed by the communities and trained by Probation Services, manage the program and report to Probation Services. Currently, there are nine reserve communities involved in the program. Data regarding the numbers of native participants and the rate of successful completion were not available at the time this report was written.

8.5 Ontario

Ontario has had fine option pilot projects in operation since 1983 in Niagara Falls and Hamilton. The projects are provincially funded and apply to adults who are convicted under the *Provincial Offences Act*. Ontario Ministry of Correctional Services officials advise that consideration is being given to expanding both the number of projects and the scope of the program to include offenders convicted of *Criminal Code* offences. The program is not specifically geared to natives in any way.

The Ontario Community Service Order Program is more active. It is similar to the programs in British Columbia and Manitoba in that contracts are concluded between the Ministry of Correctional Services and individual communities. Six contracts of a total of sixty are with reserve communities. Again, the community-appointed program workers are trained by the Ontario government and report to the area probation officers. A comprehensive evaluation of the program has not been undertaken to date.

8.6 New Brunswick

New Brunswick has a relatively recent (five years) fine options program for adults. The program does not provide special provisions for natives.

The community service order (CSO) program, which is available to adults and young offenders, runs at the community level in a manner similar to the program in other provinces. The community-assigned "resource persons" report directly to area probation officers. Currently, three of thirteen reserve communities are involved in the program. Data regarding numbers of native individuals and successful completion rates were not available at the writing of this report.

8.7 Nova Scotia

Nova Scotia does not have a fine options program, although one is being planned. The community service order program is open to adults and young offenders (16-17 years) and is run out of 18 probation offices by 45-50 probation officers throughout the province, but mostly based in Halifax and Dartmouth. The program does not involve community contracts or community supervision of clients, thus leaving that responsibility to the probation officers.

The exception is the Eskasoni Reserve in Cape Breton in which a native individual operates as an assistant probation officer. The Assistant Probation Officer Program provides training, a wage of $500 per year, and travel expenses to individuals whose communities are willing to participate. The officer monitors CSO clients and reports to the probation officer. There have never been more than two assistant probation officers in native communities in Nova Scotia.

8.8 Quebec

Quebec, like other provinces, has a fine options program that is limited in its accessibility to native people. More significant is Quebec's community service orders (CSO) Project for Inuit and Indian communities north of the 50th parallel. In ensuring that the service order is both fair and appropriate, local committees make recommendations to the courts when service orders are being decided. An evaluation of the project has not yet been undertaken. However, respondents in Quebec, including a judge actively involved in the process, see it as effective. It is worth noting that the committees are similar in principle to the justice committees in Manitoba, with the exceptions that they tend to represent a cross-section of local people, rather than local professionals, and that committee members speak to the court regularly, rather than occasionally.

9.0 COMMUNITY INITIATIVES

There are numerous cases across the country of communities initiating new and entirely community-specific efforts in the justice field. As a rule, these initiatives take a "holistic" approach to social control, mediation, restitution and rehabilitation. They usually refer to community-specific needs and values and attempt to involve special groups within the community, such as the elders.

These initiatives often are not funded by external departments or agencies; rather, the work is done on a voluntary basis or as part of the mandate of community officials as defined by the community. Recently, such initiatives have also appeared in the context

of self-government development, according to the requirements for negotiating self-government as set out by Indian and Northern Affairs Canada. Many communities have built justice issues into their self-government plans – whether presented for negotiation to the federal government or not – as a priority.

Communities involved in this kind of community initiative refer to certain factors that are essential for success:

- identification of community needs;
- reference to community values;
- the employment of methods of prevention, mediation, reconciliation, restitution, rehabilitation;
- the commitment of all community members (as in Aboriginal Australia – Hazelhurst, 1987: 265);
- the active involvement of elders; and
- connecting justice related efforts to the land.

Perhaps some of the best examples of community successes are those involving the establishment of wilderness camps that are built and run by native communities and that serve as alternatives to sentencing. Fort Albany, Ontario and Big Trout Lake, Ontario, for example, both operate camps for young offenders. The camps involve community elders and others, including native social workers and counsellors, in exposing the young offenders to life on the land. They receive training in a variety of land-based and academic subjects and are inculcated with customary values as expressed by the elders. Preliminary indications are that the camps are having a positive effect on recidivism rates in the regions of northern Ontario that they serve.

The Anishinaabe Wilderness Camp near Kenora was established by native organizations with a view to rehabilitating native individuals convicted of liquor-related offences. Most of the program's clients serve out the last month of their sentence at the camp on temporary absence from the Kenora jail. A similar program exists at the Eskasoni Reserve in Cape Breton where the community established Mi'kmaw Lodge to serve Micmacs from across the province.

Systematic assessments of these kinds of initiatives – whether funded or not – have not been undertaken. Nor have all the examples in communities across the country been documented. It is therefore difficult to identify their nature and extent without a comprehensive fieldwork project involving community level interviews.

10.0 RESEARCH AGENDA

There are relatively few universal sentencing option programs to which native people have easy access; and there are even fewer programs that are geared specifically to natives. With some exceptions (e.g., the Manitoba fine options program), sentencing option programs have not undergone rigorous assessment, leaving funders and participants unclear as to their effectiveness.

Efforts initiated by individual communities often remain unidentified and none have been assessed in any systematic way.

In policy terms, it should be assumed that any program which aims to increase the accessibility of universal sentencing options to native people is desirable. However, in the absence of evaluations of various program delivery mechanisms, as described in Part 2 of this report, we do not know which approaches should be pursued. Similarly, our lack of awareness of community-specific initiatives does not allow comparison with universal programming.

The first item on the research agenda should be an inventory of past and present sentencing option programs, including both the universal programs (e.g., fine options/CSO) and the native specific programs (e.g., the High Level Diversion project). Provincial ministries, the federal Ministry of the Solicitor General, the federal Department of Justice and non-profit delivery agencies will have to be canvassed to build the inventory.

Similarly, native community initiatives will have to be identified and documented in terms of their objectives, structures, methods, costs, duration, impacts and effectiveness. In this case, it will be necessary to canvass and interview practitioners in the field: for example, police (RCMP, provincial, band); judges; crown attorneys; defence counsel; community leaders; and community program workers.

When the inventories of programs and community initiatives have been completed, it will be necessary to undertake a more comprehensive study to evaluate a series of representative cases in both categories. General evaluation issues will include rationale, objectives achievement, efficiency/effectiveness and impacts. More specifically, the following evaluation issues will have to be addressed:

- the numbers of natives and non-natives served;
- successful program completion rates;
- native/non-native needs and program accessibility vis-a-vis an urban/rural/isolated continuum;

- offender characteristics: prior record, offence type, sex/age/location/education/employment (as in the sentencing decision model in Part 1);
- community involvement;
- management efficiency; and
- cost effectiveness.

Finally, it will be necessary to do a comparative analysis of approaches within the two categories (programs and community initiatives) and between the two categories. This will inform policy development with regard to the most feasible directions for future work in the area of sentencing options for native people.

PART III: SUMMARY – GAPS IN EXISTING KNOWLEDGE

11.0 GAPS IN EXISTING KNOWLEDGE

The issues of native/non-native sentencing disparity and availability/accessibility of appropriate sentencing alternatives are distinct and yet related. They are distinct in that each issue raises its own set of research questions with concomitant sources of information and methodologies. They are related to the extent that policymakers and program planners must recognize that the way groups of people are sentenced through the decision-making process cannot be disassociated from the ways in which they are to engage in the restitution/rehabilitation process generally demanded by our society. For example, are more treatment-oriented institutional programs required for native offenders in view of the crimes for which they are being sentenced (i.e., a high proportion of alcohol-related offences)? This is related to the question of the role of judges in the decision-making process, as posed by Archibald (1989) and observed by Clark (1988): how are judges to deal with certain individuals and groups (e.g., natives) when they are aware that appropriate post-sentence facilities are not available?

Thus, the nature of the offence, the way that individuals and groups are dealt with in the decision process, and the post-sentence options are all related – for the offender, the judicial decision-maker and the policy maker.

There are other complications that require us to examine sentencing disparity and sentencing alternatives as one large issue. For example, it is possible that jurisdictional (by province and territory) and regional (urban/rural/isolated) variation have a bearing on the ways in which individuals and groups are sentenced. For example, British Columbia has a different civil procedure for dealing with fine defaulters than the Prairie provinces. This could have implications for the way entire groups of people (primarily the poor, including natives) are sentenced regarding this particular offence in British Columbia, on one hand, and in the Prairie provinces, on the other. If we find that one jurisdiction has a proportionately high rate of imprisonment for fine default (again likely to affect natives to a relatively high degree), then each jurisdiction may want to examine the implications of the policies of the other and amend their own procedure accordingly. Similarly, the post-sentence treatment of fine defaulters could be amended in one or both jurisdictions to accord with sentencing procedures and the **need** in the case of fine defaulters (e.g., is imprisonment appropriate or is there another more effective option?).

The gaps in existing knowledge in sentencing disparity and sentencing options are significant. Section 5 of the report indicated that we have lacked a consistent methodological approach to researching the nature of sentencing and have had to work

with essentially incomplete data sets. Therefore, we need to develop and implement a research model based on decision points. Within this model we must account for a number of factors, all of which currently represent gaps in our knowledge. At the level of the individual offender, these factors include the following:

(a) legal variables – prior record, offence type; and

(b) extra-legal variables – sex, age, location, education, employment.

We need to compile data sets from the courts and the correctional institutions which will provide the basis for analysis and comparison of the individual offender information just listed. The data sets will include information on dispositions, sentence type and length, and actual time incarcerated. Again, these data will have to be organized in a consistent format across all provincial/territorial jurisdictions and regions within the jurisdictions in order to allow comparisons on this basis.

The gaps in knowledge in the area of sentencing options are equally significant. First, we do not know the effectiveness of many of the past and current programs because few have been evaluated in any comprehensive way. Furthermore, among those who have been evaluated there has not been any attempt to compare the evaluation results with a view to designing new policies or improving programming.

Second, we are unaware of many of the initiatives that have started and are continuing in individual native (and non-native) communities. In the absence of our knowledge of the existence of many such initiatives – let alone any assessment of their effectiveness – it has been impossible to learn from them. Yet based on preliminary discussions with representatives of several native communities in the context of this report, it would appear that handling of offenders (especially young offenders to this point) that is appropriate in terms of their communities can be effective and possible with limited community resources.

The study and comparison of past and current efforts, whether provincial, territorial or community-initiated, will have to account for many of the factors described above with respect to sentencing disparities, offender characteristics, nature of the offence, urban/rural/isolated variation, etc.

The gaps in existing knowledge are substantial. In order to develop effective policies and effective, cost-efficient programs that meet the needs of individuals, communities and our society generally, we must begin to collect relevant information on the current status of sentencing and sentencing alternatives. Following that, we must

undertake a comparative analysis based on the approaches outlined in this paper in order to begin to see the causal effects in the sentencing process and to begin to get some guidance as to how to address the problems.

Section 5 and Section 10 of the paper outline the initial steps that should be taken to gathering relevant information and analyzing that information.

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